Filed 2/9/10 P. v. Walkner CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL LLOYD WALKNER, Defendant and Appellant.	E048901 (Super.Ct.No. FWV800803) OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

Anita P. Jog, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Russell Lloyd Walkner appeals following his guilty plea to one count of corporal injury to a spouse. (Pen. Code, § 273.5.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2008, defendant had been separated from his wife for quite some time; he went to the wife's home to see their 12-year-old daughter. The wife told defendant their daughter was in the shower so he could not see her at that time. Defendant then called his wife on the telephone and told her he would have a gun with him to shoot her the next time he came over. The wife hung up the telephone and dialed 911. When the wife was on the telephone with a sheriff's dispatcher, she received another telephone call from defendant. Defendant stated he was going to kill the wife. The dispatcher was able to hear the telephone conversation. The responding deputy was able to obtain a copy of the recording of the 911 call to be used as evidence against defendant at trial.

On March 21, 2008, defendant was charged with a single count of criminal threats. (Pen. Code, § 422.) On April 16, 2009, the date set for the preliminary hearing, the People presented a plea offer on the record. The terms included felony probation, 120 days in jail, completion of a domestic violence treatment program, as well as other standard domestic violence provisions. In addition, the People would agree not to oppose a request to reduce the felony to a misdemeanor after one year of probation if defendant completed his jail time and domestic violence treatment program as required.

In response to the offer, defendant said, "I can't think of anything at this time, Your Honor. I'm just not—my mind's not on the offer right now for some reason. I came because I understood it was a prelim. I'm not really focused." The court then explained the plea bargaining process to defendant and said, "I'd simply want to make

sure that you've taken enough time and have focused sufficiently on your case to decide whether that's an offer that you want to undertake or not. [¶] If you need more time, take more time. . . . [¶] . . . [¶] I just want you to consider what the possibilities are." Defendant indicated to the court his major concerns were the effect the offer would have on his vocation as a licensed nurse and whether he would be able to meet the financial terms that would be required of him on probation. At counsel's request, the court continued the proceeding until after the lunch break so defendant could have more time to talk to his attorney and to think about the offer.

When the proceeding reconvened, defendant submitted an executed change of plea form indicating another count would be added for corporal injury to a spouse (Pen. Code, § 273.5), so defendant would not be pleading guilty to a serious or violent felony offense. The court reviewed the terms of the agreement with defendant on the record. Defendant responded affirmatively on the record when he was asked whether he understood the terms of the agreement and whether he had adequate time to discuss the issues with counsel. In addition, counsel indicated she reviewed the change of plea form with defendant and was satisfied he understood his rights. Defendant then pled "no contest" to a single count of corporal injury to a cohabitant. The court accepted the police report as a factual basis for the plea.

On June 24, 2009, defendant filed a motion to withdraw his plea because he felt pressured to accept the plea and was "confused about the nature and consequences" of the plea. In particular, defendant claimed he did not realize "the devastating effect this plea would have on [his] ability to continue in [his] profession as a nurse." Counsel indicated

defendant's decision to plead guilty was based on an assumption that evidence of prior similar acts would be admissible, but after some research, defendant came to believe this evidence probably would not be admitted. Defendant believed "he could probably beat this" if he went to trial. In an opposing affidavit, the prosecutor stated the impact of a felony conviction was discussed during plea negotiations. As a result, he agreed to allow defendant to plead to a nonstrike offense and to a reduction of the felony to a misdemeanor after one year if defendant completed his jail time and domestic violence treatment program.

After reviewing the transcript of the plea proceedings, the trial court denied defendant's motion to withdraw. Based on the record, the trial court said defendant was aware of the consequences of entering the plea and "simply doesn't want to engage in the agreement that he agreed to previously." As a result, there was insufficient justification to withdraw the plea The court also noted the evidence against defendant included a damaging tape recording that would be admissible should defendant be brought to trial. Thereafter, the court sentenced defendant in accordance with the plea agreement to three years' probation, subject to various terms and conditions, including 120 days in jail and completion of a domestic violence treatment program.

DISCUSSION

On July 22, 2009, defendant filed a notice of appeal indicating he wished to challenge the validity of the plea. At the same time, he requested a certificate of probable cause for the appeal. The trial court denied the request and marked the notice "inoperative." Defendant then filed an amended notice of appeal on August 10, 2009,

stating he wished to challenge the sentence or other matters that occurred after the plea, which do not affect its validity.

We appointed counsel to represent defendant on appeal. Appointed counsel on appeal has filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth the facts and procedural history, raising no specific issues, and requesting this court to conduct an independent review of the record. We offered defendant an opportunity to file a personal supplemental brief.

Defendant filed his supplemental brief on January 12, 2010. In his supplemental brief, defendant essentially argues his plea is invalid because he received ineffective assistance of counsel. According to defendant, his counsel was ineffective because he or she (1) did not fully or accurately advise him about the admissibility of prior acts evidence, and (2) did not provide him with access to the police report and the probation report, which, according to defendant, contain inconsistent statements. In addition, defendant argues his request for a certificate of probable cause was erroneously denied because it was considered and decided by the same judge who denied his motion to withdraw his plea.

Penal Code section 1237.5 states in part as follows: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the

proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

In all of his ineffective assistance of counsel claims, defendant challenges the validity of his plea. However, the trial court denied defendant's request for a certificate of probable cause. In the absence of a certificate of probable cause, we may not consider the validity of defendant's plea.

Defendant also challenges the validity of the trial court's denial of his certificate of probable cause. However, an order denying a certificate of probable cause is not appealable under Penal Code section 1237, but is reviewable only by writ of mandamus. (*People v. Castelan* (1995) 32 Cal.App.4th 1185, 1188.)

In any event, we have reviewed the record regarding the entry of the plea and find no error even if we could reach the issue. (*People v. Panizzon* (1996) 13 Cal.4th 68, 83.) Nor does it appear defendant could prevail on his ineffective assistance of counsel claim. A cognizable claim of ineffective assistance of counsel following a guilty plea requires a showing that the defendant would not have pled guilty and insisted on going to trial but for counsel's incompetent advice. (*In re Resendiz* (2001) 25 Cal.4th 230, 253.) Such a claim must be corroborated by independent, objective evidence. (*Ibid*.) Pertinent factors to be considered include the advice actually given by counsel, whether counsel accurately and effectively communicated the terms of the offer to the defendant, and the difference between the offer and the probable consequences of proceeding to trial, as viewed at the time the offer was made. (*Ibid*.)

Defendant does not specifically allege he would have insisted on going to trial but for counsel's bad advice. Without more, the record suggests counsel's advice was competent under the circumstances. There is nothing in the record that even suggests defendant would have had any viable reason to pass up the exceedingly favorable offer he accepted in order to proceed to trial. His sentencing exposure for the charges against him was considerably higher than the grant of probation he agreed to as part of the plea agreement. The evidence against defendant was very strong because the 911 dispatcher heard defendant threaten his wife, and the threat was also recorded. Under these circumstances, there is no reason for us to conclude defendant was given advice that was not in his best interest. Nor can we discern how defendant could have been prejudiced by counsel's advice in connection with the plea agreement he entered.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.